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Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-11 ✓

In re Application of

TELEPHONE AND DATA
SYSTEMS, INC. File No. 10209-CL-P-715-B-88

For facilities in the Domestic Public
Cellular Telecommunications Radio
Service on Frequency Block B, in
Market 715, Wisconsin 8 (Vernon),
Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: June 9, 1994;

Released: June 21, 1994

By the Review Board: MARINO (Chairman) and
GREENE.

1. Townes Telecommunications, Inc. (TTI), pursuant to 47 CFR 1.301(a)(1), appeals a ruling from Administrative Law Judge Joseph P. Gonzalez (ALJ) denying its request for leave to intervene as a matter of discretion pursuant to 47 CFR 1.223(b). See *Order*, FCC 94M-270, released April 18, 1994. Relying on the same arguments of economic interest and ability to provide background information made before the ALJ, TTI now argues that it established "party in interest" status below entitling it to intervene as a matter of right pursuant to Section 1.223(a). See Appeal at 1, 3. We affirm the ALJ's denial of intervention because TTI has not shown an adverse tangible economic interest in the outcome of this case. See *Algreg Cellular Engineering*, 6 FCC Rcd 5299, ¶¶ 5-8 (Rev. Bd. 1991).

2. *Background*: The application of Telephone and Data Systems, Inc. (TDS) for cellular facilities in the Vernon, Wisconsin market was designated for hearing "on character issues concerning a TDS subsidiary's conduct before the Commission [United States Cellular Corporation (USCC)], and whether this calls into question TDS's qualifications to be a Commission licensee." *TDS*, 9 FCC Rcd 938 ¶ 1 (1994). The issues, which grew out of *La Star Cellular Telephone Co.*, 7 FCC Rcd 3762, at n.3 (1992) read:

(1) To determine whether United States Cellular Corporation misrepresented facts to the Commission, lacked candor in its dealings with the Commission, or attempted to mislead the Commission, and, in this regard, whether United States Cellular Corporation has violated Section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17.

(2) To determine, based on the evidence adduced in issue 1, above, whether Telephone and Data Systems, Inc. possesses the requisite character qualifications to

hold the cellular Block B authorization for the Wisconsin 8 (Vernon) Rural Service Area and, accordingly, whether grant of its application would serve the public interest, convenience, and necessity.

3. Within 30 days of the release of the designation order, TTI filed a timely petition for leave to intervene, which the ALJ denied because TTI had failed to show "a tangible economic interest in the outcome of the instant proceeding, or that its participation will assist the Commission in the resolution of the issues at hand." *Order, supra*, at 2. Section 309(e) of the Communications Act provides that:

When the Commission ... designates an application for hearing, the parties-in-interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register.

Section 1.223(a) of the Commission's Rules which implements this statutory provision provides that:

(a) Where, in cases involving applications for construction permits and station licenses... the Commission has failed to notify and name as a party to the hearing any person who qualifies as a party in interest, such person may acquire the status of party by filing, under oath and not more than 30 days after the publication in the FEDERAL REGISTER of the hearing issues or any substantial amendment thereto, a petition for intervention showing the basis of its interest. . . . Where the person's status as a party in interest is established, the petition to intervene will be granted.

4. In its Appeal at 3, TTI now argues that its interest in this case is "concrete and intervention is required pursuant to § 1.223(a) of the rules." To support this general plea for relief, TTI quotes from its intervention motion that "in various cellular markets in which TTI has or will have ownership interest, TDS and its affiliated companies are in a position to acquire controlling interest." *Id.*, at 1. It argues "a decision in the instant case could have a significant impact upon TTI, in those markets in which TDS is positioned to acquire a controlling interest." *Id.*, at 2. TTI alludes to only one specific example which "clarifies" its economic interest and right to intervene in this case: the Commission's August 20, 1993 consent to assign cellular facilities in the Hardeman, Texas market. TTI asserts that one of its subsidiaries "is a one-third owner of the assignor and will possess an ownership interest upon consummation" of that transaction. *Id.*, at 3. Apparently, because TDS or a subsidiary is a party to that transaction, the Commission has conditioned a grant upon "any subsequent action the Commission may take concerning the [La Star] issues" designated against TDS and its subsidiary in the instant case. ¶ 2 above. It appears the Texas transaction has not been consummated because of the condition. See Appeal at 2-3, nn.2-3.

5. TDS and its subsidiary USCC oppose TTI's appeal. They note that the issues designated for hearing in this case are confined to the Vernon, Wisconsin market. *supra* ¶ 2.

where TTI has no ownership interest; and that after resolution of the Wisconsin case, if the Commission decides to revisit the Texas proceeding, in which TTI does have a minority ownership interest, "TTI will have a full opportunity to seek to participate in any such proceeding in which it holds an interest." Opposition, at 3. Moreover, TDS states that it and TTI "have identical interests in the outcome" of the instant case, and it is well-settled that persons with common economic or ownership interest do not have a right to intervene in FCC proceedings absent a showing that their interests will not be represented by the majority owners. *Id.*, at 4-5.

6. *Discussion:* A person seeking to intervene as a party in interest in an FCC proceeding must show that it will be aggrieved or adversely affected by a Commission decision in that case. *Algreg, supra*. Shortly after the adoption of the Communications Act, the Supreme Court, in *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 476-77 (1940), held that "one likely to be financially injured by the issue of a license" was a party-in-interest with standing to appeal an FCC licensing proceeding. The Court of Appeals for the District of Columbia Circuit later indicated in *Johnston Broadcasting Co. v. FCC*, 175 F.2d 351, 358 (D.C. Cir. 1949), "[i]t is only common sense to assume that adversaries with substantial interests at stake will overlook no advantage to be found in an opponent's weaknesses." (Emphasis added). Following these Court decisions, Congress in 1952 specifically provided in Public Law No. 320, 66 Stat. 715, amending § 309, that parties-in-interest have an absolute right to intervene in licensing proceedings without showing that they could assist in the resolution of the issues. See *American Communications Ass'n v. United States*, 298 F.2d 648, 651 n.5 (2d Cir. 1962); see also *Elm City Broadcasting Corp. v. U.S.*, 235 F.2d 811, 816 (D.C. Cir. 1956) (Commission may not deny intervention to a party in interest merely because it thinks intervenor's participation would not aid in its decisional process).

7. TTI has failed to show how the ALJ erred in ruling that it had not shown a tangible economic interest in the outcome of the instant proceeding. To establish that it is a party in interest in the Vernon, Wisconsin market, TTI is arguing only that its minority ownership interest in a grant in Texas is conditioned on the outcome here, and consequently, that consummation there has been delayed. TDS is correct that TTI has an identical or common interest with TDS in the outcome of the present Wisconsin hearing: a speedy and favorable resolution of the issues in this case that will remove the condition delaying consummation of the assignment. TDS is also correct that intervention will not be granted in Commission cases where different principals share identical or common interests. See, *AT&T*, 7 RR 2d 515 (1966) (corporate stockholders who sought to intervene failed to show independent interest from that represented by the corporation itself); see also *The Seven Hills Television Co.*, 2 FCC Rcd 6867, 6889 ¶ 72 (Rev. Bd. 1987) (subsequent history omitted). And TTI has not shown that it has any pending mutually exclusive applications with TDS that may justify intervention. See *RKO General*, 94 FCC Rcd 890, 893 ¶ 4 (1983). Furthermore, before any adverse action can be taken in the Texas case on the basis of any adverse facts that may be developed here, further proceedings must be instituted by the Commission, at which time TTI will have an opportunity to intervene.

8. Finally, our own review of the record establishes that TTI has not shown that its participation will assist the Commission in resolving the designated issues. Although this point is not raised in TTI's appeal, we note that before the ALJ, TTI referred to a civil action pending in Texas in which it is a party, along with TDS and affiliated companies, stating that TTI was, therefore, able to provide useful information about the way TDS and its affiliates conduct their business as required by § 1.223(b). Section 1.223(b) provides:

(b) Any other person desiring to participate as a party in any hearing may file a petition for leave to intervene The petition must set forth the interest of petitioner in the proceedings, must show how such petitioner's participation will assist the Commission in the determination of the issues in question, must set forth any proposed issues in addition to those already designated for hearing, and must be accompanied by the affidavit of a person with knowledge as to the facts set forth in the petition. The presiding officer, in his discretion, may grant or deny such petition or may permit intervention by such persons limited to a particular stage of the proceeding.

(Emphasis added). Here, the specific issues which the Commission designated for hearing concern the candor of USCC in the *La Star* case and any possible impact upon TDS' character qualifications. TTI failed to show any special knowledge regarding the designated *La Star* issues. Thus, the ALJ did not abuse his discretion when he held that TTI had failed to show that "its participation will assist the Commission in the resolution of the issues at hand." *Order, supra*, p. 2. See *Listeners' Guild Inc. v. FCC*, 813 F.2d 465, 470 (D.C. Cir. 1987) ("broad, undifferentiated desire to participate does not satisfy the strictures of the intervention rule").

9. ACCORDINGLY, IT IS ORDERED, That the Appeal of Order Denying Intervention, filed April 25, 1994, by Townes Telecommunications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board